80-823

Supreme Court, U. S.
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No.

In The

Supreme Court of the United States

October Term, 1980

SALVADOR CHARLES BASSO,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

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November 18, 1980

QUESTION PRESENTED

Whether liberty interests of a minimaly supervised probationer in the last six weeks of his probation are sufficiently substantial to require that they not be interfered with except upon arrest procedures which meet Fourth Amendment standards or upon use of an order to show cause based upon facts supported by oath or affirmation?

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SALVADOR CHARLES BASSO,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 23, 1980.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. Excerpts appear in 28 Cr. L. Rptr. 2104 (Oct. 29, 1980). The Slip Opinion is attached as Appendix A. The opinion of the district court was not reported, and is attached as Appendix B.

JURISDICTION

The opinion of the court of appeals was issued on September 23, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No person shall be ... deprived of life, liberty or property without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

18 U.S.C. §3653 provides, in pertinent part, as follows:

> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which

> the probationer is being supervised, or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS.

Petitioner Salvador Charles Basso was charged on March 11, 1975 with two counts of income tax evasion in violation of 26 U.S.C. §7201. The petitioner entered into a plea bargain. The United States Attorney agreed that the government would not protest if the petitioner pleaded nolo contendere and got a suspended sen-

tence. Def's Ex. 3.[1]

This proposal was presented to United States District Judge Robert C. Zampano, who said he would go along if the government disavowed any claim that the untaxed money came from organized crime. Def's Ex. 1. At Judge Zampano's request this agreement was confirmed in a letter to the United States Attorney. A copy was sent to Judge Zampano. Def's Ex. 3; Tr. 180-183.

On January 14, 1977 the petitioner was sentenced on the second count to three years imprisonment and a $4,000.00 fine, the first count to be dismissed, with sentence suspended. Tr. 48. The Court

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[1] The Transcript of the combined probable cause and motion to dismiss hearing held on March 12, 1979 is cited: "Tr. ____." Exhibits offered at that hearing are cited as such, without date. References to transcripts of other proceedings below are cited by date and page: "2/22/79 Tr. ____."

then imposed two years of probation. Def's Ex. 2.

The petitioner was placed under the supervision of U.S. Probation Officer Joseph Gagne. Tr. 21. In January, 1977 Officer Gagne presented petitioner with "Probation Form No. 7" which gave the term and the conditions of petitioner's probation. Tr. 22-23, Tr. 147. Condition No. 2 read "You shall associate only with law abiding persons and maintain reasonable hours." Tr. 101. Officer Gagne recalled giving the petitioner his customary warning to probationers, which was: not to associate with persons who were on probation or parole, or who had criminal records, or who were presently engaging in criminal activity, or who were the probationer's co-defendants in the case in which he was convicted. Tr. 156.

Officer Gagne did not tell the petitioner how to avoid association with persons of this description who were customers of the petitioner's active restaurant and oil businesses. Tr. 157.

Officer Gagne showed his confidence in the petitioner by informing him on July 27, 1978 that henceforth he would report in person only once every three months, as Supervising U.S. Probation Officer Tommaso D. Rendino and Officer Gagne had concluded petitioner's would be a "minimum supervision case". Tr. 58-59. The last meeting with Officer Gagne would thus arise in November, 1978. Tr. 148.

It was at around this time, late July 1978, that another probation officer, Officer Pond, decided that the petitioner had violated his probation. Pond was

supervising Francis Curcio, a probationer suspected of complicity in a drug ring. Tr. 73, 127-28. Pond read an undercover report which said that three men with tangential relationships with Curcio had eaten lunch in petitioner's restaurant. One of the three had reported a talking to Basso about illegal gambling. Tr. 88-89, 73, 127-28. Officer Pond mentioned this report to Officer Gagne. Tr. 89, 150, 158. Officer Gagne made no record in petitioner's file and never mentioned the report to the petitioner. Tr. 89.

In October, 1978 Pond met with Officer Gagne and Officer Rendino to discuss the report. A notation indicating possible violation of Condition No. 2 was made in petitioner's file. Tr. 150. However, Officer Gagne neither contacted petitioner for an explanation nor started

revocation proceedings. Tr. 151. Officer Gagne testified that in fact he had had no problem with the petitioner during the entire period of supervision, Tr. 152, 162, and had learned nothing new connecting him with organized crime. Tr. 163.

Officer Gagne learned in late October that he would be transferred. Tr. 159.

On November 28, 1978, before any general disposition of Officer Gagne's caseload, Pond took over the petitioner's file. Tr. 50, 88, 152. Neither Officer Gagne nor Officer Pond could explain later why the petitioner's file was transferred before the rest. The petitioner's case was the only one, out of all the cases transferred by Officer Gagne, with only a few weeks remaining in the period of probation. Tr. 162.

In November the petitioner visited Officer Gagne for the next to last time. Although Officer Gagne had possessed for a month all of the facts later adduced to justify revocation proceedings, and the report was sitting in petitioner's file, Officer Gagne did not raise the problem with petitioner, ask for an explanation, or even hint that probation might be revoked. Tr. 151. Officer Gagne also kept silent about his departure and the impending transfer of the petitioner's file.

On November 28, 1978 Pond officially became the petitioner's probation officer. The day after transfer Pond put the case for revocation before Supervising Officer Rendino. Tr. 139.

The petitioner came in at Pond's request on December 12th. Tr. 107. It was their first and only meeting. Tr.

95. The petitioner told Pond that the meeting had concerned debts owed him; two of the men were customers of the petitioner's oil business, Tr. 97, and had failed to pay their bills.

Pond did not ask for corroboration or investigate the petitioner's explanation, though he had never spoken to the petitioner before and had no basis on which to judge his credibility. Tr. 124. Pond did not mention to petitioner the matters revealed to him in his Curcio investigations. The very next day Pond made out a Form 12 application to District Judge Robert C. Zampano for a warrant for the petitioner's arrest and revocation of probation. Tr. 107. The application was accompanied by a two page secret memorandum which purported to state the grounds for revocation.

Only a small portion of the memorandum, however, was devoted to the restaurant meeting. The remainder told of the petitioner's supposed ties to organized crime and the background of a totally unrelated drug conspiracy. The thrust of Pond's memo was that the petitioner, a major organized crime figure intimately involved with a drug conspiracy, had initiated a meeting with other criminals to further that conspiracy. Tr. 45. The memorandum was not sworn under oath, Tr. 84, and contained no indication of the source of Officer Pond's information or his basis for considering the source reliable. Tr. 85-86.

Judge Zampano was not shown the reports underlying Officer Pond's statements. 2/22/79 Tr. 9-11. Nor did Officer Pond tell Judge Zampano of the petitioner's explanation for the meeting,

Tr. 97, or the fact that no-one had ever connected Basso with the drug conspiracy. Tr. 97.

Officer Pond and Supervising Officer Rendino met privately with Judge Zampano. Tr. 44. The deficiencies of the memorandum were not made up at the meeting. Officer Pond mentioned the reports on which he relied, but he did not say why he credited his informants' conclusion that Basso was part of a Mafia "family," or connect the petitioner to the drug conspiracy.

Later that week Pond described the alleged violation to a U.S. Attorney, who in turn gave Judge Zampano an oral opinion that this was a violation of Condition 2 which, if proved, would support revocation. Tr. 45-47, 127. Officer Pond resubmitted the Form 12 application for revocation and an arrest warrant.

Both were signed on December 18, 1978. Tr. 47.

B. STATEMENT OF PROCEEDINGS BELOW.

On December 18, 1978, the petitioner was informed of the outstanding probation revocation arrest warrant by the Probation Office, surrendered to the United States Marshals Service, and was released on personal recognizance. The petitione was "arraigned" on December 19, 1978 before District Judge Zampano, at which time his request for a preliminary hearing was granted.

The petitioner moved to dismiss the application and quash the warrant on Fourth Amendment grounds, and for discovery, on January 5, 1979. At a chambers conference Judge Zampano mentioned in passing Officer Pond's confidential memorandum, which had not been provided to the petitioner with the arrest war-

rant. The petitioner asked for the memorandum, but Judge Zampano placed it under seal at the government's request.

On March 12, 1979 another District Judge, Ellen B. Burns, held a combined hearing on both the constitutional issues and probable cause. The petitioner requested that the hearing encompass probable cause because Pond's confidential memorandum, which had been unsealed the previous week, suggested misconduct by Officer Pond in obtaining the warrant.

On November 2, 1979, Judge Burns issued a lengthy and comprehensive ruling quashing the probation violation arrest warrant for failure to meet the requirements of the Due Process clause and the Fourth Amendment. Appendix B. The Government appealed on November 30, 1979.

On September 23, 1980 the Second Circuit, through Judges Lumbard, Mansfield and Mulligan, reversed the district court order and remanded for further proceedings. Appendix A. On October 22, 1980 the same panel, without explanation, issued an "Order Amending Opinion" changing the court's disposition from "Reversed and remanded" to "Remanded." This Order was supplemented with another making minor changes. This petition addresses that portion of the court of appeals ruling which reverses the order quashing the arrest warrant, as that portion of the opinion reversing the district court order dismissing the probation revocation proceeding is now dicta.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the writ for the following reasons:

1. This case offers the Court the opportunity to clarify the relationship between probationers' liberty interests and their rights to due process of law and arrests not based on probable cause.

2. The decision of the court of appeals is contrary to decisions of this Court guaranteeing that probationers cannot be deprived of freedom without due process of law.

3. This Court has not yet declared what procedures are constitutionally required before a probationer can be deprived of his or her interest in liberty by a probation revocation arrest warrant.

These questions raise important issues of federal law, and the opinion of the

court of appeals calls for the exercise of this Court's power of supervision.

I. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO DEFINE THE SCOPE OF PROBATIONERS' LIBERTY INTERESTS AND THEIR RIGHT TO FREEDOM FROM ARRESTS WITHOUT PROBABLE CAUSE AND IN DUE PROCESS.

This court has repeatedly held that parolees and probationers have substantial liberty interests. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). These liberty interests are determined by the actual degree and type of liberty enjoyed by the parolee or probationer, not formulas such as "constructive custody," or the discredited "right/privilege" distinction. The probationer here had a strong expectation of liberty. He was a "minimum supervision" probationer in the last month of a two year probation period imposed as the result of a plea bargain. He had heard no criticism of his conduct from his probation officer. At the time of arrest the incident relied

upon a revoke probation - a technical violation of conditicns - was over fourteen months old. All these factors suggest that the petitioner's liberty interests approached those of an ordinary citizen.

Yet the record shows the Probation Office stripping the petitioner of his liberty, by issuing a warrant for his immediate arrest, without any of the elementary due process protections accorded ordinary citizens. The warrant application was non-factual, conclusory, and unsworn. It was supplemented with a secret memorandum, also non-factual and unsworn, and off the record conversations. Material information negating probable cause to arrest was intentionally omitted from the memorandum and application. Any one of these defects would invalidate a normal warrant, yet

the court of appeals approved, asserting that the detention of a probationer is "not an 'arrest' for Fourth Amendment purposes." Slip Op. at 5780, App. 12a, quoting United States v. Polito, 583 F.2d 48, 56 (2d Cir. 1978). The court of appeals essentially held that the petitioner was not entitled to any due process protections because the arrest of a probationer does not trigger the Fourth, Fifth and Fourteenth Amendments.

This situation demands correction. At best the court of appeals opinion so minimizes the liberty interests of probationers as to render them meaningless. At worst, it denies them entirely. The district court held that the petitioner's rights entitled him to protection from being taken into custody for revocation of probation without basic due process: either by a warrant, issued on facts

showing probable cause supported by oath or affirmation, or by an order to show cause initiated by an affidavit. Numerous other federal courts (significantly not cited by the court of appeals here) have ruled that parolees and probationers have similar rights against unreasonable searches. See, e.g., United States v. Workman, 585 F.2d 1205 (4th Cir. 1978); United States v. Bradley, 571 F.2d 787 (4th Cir. 1978); Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), cert. denied, 423 U.S. 897 (1975) (Hufstedler, J. dissenting); United States ex rel. Santos v. New York State Board of Parole, 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972). The district court concluded: "[i]f a probationer has certain protectible Fourth Amendment rights vis-a-vis searches and seizures, albeit these rights are less than those accorded

an ordinary citizen, a probationer similarly must have some protectible rights regarding arrests." App. 52a. The petitioner urges this Court to clarify the law and confirm that the Fourth, Fifth and Fourteenth Amendments apply to the arrest of a probationer.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO DECISIONS OF THIS COURT DECLARING THAT PROBATIONERS CANNOT BE DEPRIVED OF FREEDOM WITHOUT DUE PROCESS OF LAW.

The due process guaranteed prisoners, parolees, and probationers by the Fifth and Fourteenth Amendments is the product of careful and sensitive balancing. See Vitek v. Jones, ____ U.S. ____, 100 S. Ct. 1254, 1263-65 (1980), citing, inter alia, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (sufficient expectancy of parole to require constitutional protection); Enomoto v. Wright, 434 U.S. 1052 (1978) (due process in solitary confinement decisions); Wolff v. McDonnell, 418 U.S. 539 (1974) (loss of good-time credit; solitary confinement; due process protection of liberty interests); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process in probation revocation decision); Morrissey v.

Brewer, 408 U.S. 471 (1972) (due process in parole revocation).

The court of appeals opinion does not employ the balancing of Vitek, Gagnon, and Morrissey. The court of appeals instead extrapolated from a static, preconceived notion of the lowly status and reduced liberty interests of probationers. Slip. Op. at 5780, App. 12a. These interests were so insignificant, in the court's view, that a probation violation warrant could issue without formal process or probable cause. The Fourth Amendment did not apply because the detention of a probationer did not rise to the level of an "arrest."

It cited only one case for this dubious proposition: United States v. Polito, 583 F.2d 48 (2d Cir. 1978). That case concerned the authority to detain a parolee conferred on local police by an

outstanding parole violation warrant directed to federal marshals. The government appealed an order suppressing evidence seized at the time of detention. The Second Circuit reversed, holding that the detention was warranted, and that the local officer could search to protect his own safety. 583 F.2d at 53, 56. In dicta it was asserted that the detention of a parolee was "not an arrest for Fourth Amendment purposes." 583 F.2d at 56.

Polito does not support the court of appeals conclusion here. First, the language cited was dicta containing a specific denial that it encompassed a ruling on the grounds or procedure for obtaining a parole violator arrest warrant. 583 F.2d at 42 n. 3. Indeed, the detention was sanctioned in part because the existence of a valid warrant

issued on satisfactory evidence of parole violation diminished Polito's liberty interests.[2] See 583 F.2d at 55; accord, Henrique v. United States Marshal, 478 F.Supp. 618, 627 (N.D.Cal. 1979).

In the second place, the Polito court relied upon obsolete dicta to support the claim that the Fourth Amendment did not apply to a parole arrest warrant. Polito cited: Jarman v. United States, 92 F.2d 309, 311 (4th Cir. 1937); Story v. Rives, 97 F.2d 182, 188 (D.C. Cir.), cert. denied, 305 U.S. 595 (1938); United States ex rel. Nicholson v. Dillard, 102 F.2d 94, 96 (4th Cir. 1939); United States v.

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[2] The flaw in Probation Form 12 here - that the application did not show the source of Officer Pond's information or his reasons for thinking it reliable - was not present in Polito, since the parolee was accused, inter alia, of not reporting on time, a violation within the personal knowledge of the officer making out Parole Form H-20.

Jackson, 22 F.R.D. 38, 41 (S.D.N.Y. 1958); Hyser v.Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963); United States ex rel. Randazzo v. Follette, 282 F.Supp. 10 (S.D. N.Y. 1968), aff'd in part, 418 F.2d 1319 (2d Cir. 1969), cert. denied, 402 U.S. 984 (1971). None of these cases supports the opinion, either because their facts are not comparable to those present here, or because they are all determined by the "right/privilege" distinction previously determined by this Court not to be useful.

III. THIS COURT HAS NOT YET DECLARED WHAT PROCEDURES ARE CONSTITUTIONALLY REQUIRED BEFORE A PROBATIONER CAN BE DEPRIVED OF LIBERTY BY A PROBATION REVOCATION ARREST WARRANT.

This Court has yet to set forth the constitutionally required procedures for issuance of a probation revocation arrest warrant. The petitioner respectfully suggests that the district court identified the procedures which properly accommodate both the needs of the state and the liberty interests of probationers. A probationer should not be detained without either a warrant, issued from a factual application showing probable cause, supported by oath or affirmation, or an order to show cause initiated by an affidavit. App. 54a-56a; 66a-68a. The preliminary revocation hearing mandated by Morrissey and Gagnon cannot substitute for a prior determination of probable

cause to arrest or issuance of an order to show cause.

The facts of this case show that these protections are fundamental. There must be a single unitary warrant application. The magistrate cannot accept secret memoranda and conversations. To do so would prevent impartial evaluation of probable cause, render a sworn Form 12 application useless, and make it impossible to later evaluate the warrant. This is especially true since there is virtually no pre-revocation hearing discovery. Any other rule would subject a probationer to arrest on the basis of permanently hidden falsehoods and innuendo. Only through luck did the petitioner here learn of Officer Pond's secret memorandum. App. 29a.

The Form 12 application must also be factual and under oath. Probation of-

ficers sometimes abandon the neutral helping role foreseen by Gagnon and Morrissey, and become partners with other law enforcement officers in ferreting out crime. The district court opinion shows that Officer Pond perceived himself as a member of a federal-state drug investigation team. Such officers cannot be neutral factfinders. The requirement of sworn facts prevents abuse of discretion, deters arbitrariness, and insulates the judge from improper influences. Cf. United States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976).

The preliminary hearing is no substitute for the prior determination of probable cause. Issuance of a probation revocation arrest warrant creates the substantial likelihood that the probationer will suffer a loss of liberty.

The arrest ends the probationer's peaceful reintegration into the community and severs the rehabilitative probationer/officer relationship extolled in Morrissey, Gagnon, and other cases. Under these circumstances arbitrary action would cause the probationer substantial harm. A post-arrest hearing cannot take the place of a prior determination of probable cause.

The government interest in unsworn, non-factual warrant applications is negligible. In emergencies §3653 permits warrantless arrests "for cause." The probation officer should otherwise get a proper warrant. In cases where the officer could not swear to information showing probable cause, he could nevertheless articulate grounds for revocation under oath in an application for an order to show cause why probation should not be

revoked. See United States v. Langford, 369 F.Supp. 1107 (.D.Ill. 1973). Since no disruptive loss of liberty would occur, the preliminary hearing would be a sufficient safeguard. There is absolutely no justification for any procedure which does not require some facts under oath.

The petitioner respectfully urges that these procedures respect the liberty interest of probationers and their rights under the Fourth, Fifth and Fourteenth Amendments. The court of appeals "procedure" ignores these rights, without serving any genuine governmental interest. This Court should vindicate the rights of petitioner, and all other probationers, by implementing the procedures

devised by the district court.

Respectfully submitted,
THE PETITIONER

By_____
J. Daniel Sagarin, Esq.

A Member of the Bar of
The Supreme Court of the
United States

Dated November 18, 1980.

CERTIFICATION

This is to certify that three (3) copies of the foregoing petition, and of the Appendix thereto, were mailed first class mail, postage prepaid, to all counsel of record and the Solicitor General of the United States, this 18th day of November, 1980.

_____
J. Daniel Sagarin, Esq.

80-823

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APPENDIX
VOLUME I

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November 18, 1980

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1224—September Term, 1979

(Argued: May 14, 1980 Decided: September 23, 1980)

Docket No. 79-1464

UNITED STATES OF AMERICA,

Appellant,

—against—

SALVADOR CHARLES BASSO,

Defendant-Appellee.

B e f o r e :

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal by the Government from an order of the District Court for the District of Connecticut entered by Judge Ellen Bree Burns quashing a warrant for the arrest of Salvador Basso issued pursuant to 18 U.S.C. § 3653 upon a charge of violation of probation.

Reversed and remanded.

CAROLYN L. GAINES, Attorney, Department of Justice, Washington, DC (Richard Blumenthal, U.S. Attorney for the District of Connecticut, Sidney M. Glazer, Attorney, Department of Justice, Washington, DC, of counsel), *for Appellant.*

J. DANIEL SAGARIN, Esq., Milford, CT (William B. Barnes, Esq., Harrigan, Hurwitz, Sagarin & Rutkin, Milford, CT, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

The Government appeals from an order of the District Court for the District of Connecticut entered by Judge Ellen Bree Burns quashing an arrest warrant for violation of probation issued against appellee Salvador Basso under the authority of 18 U.S.C. § 3653.[1] For the reasons stated below we reverse.

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1 18 U.S.C. § 3653 provides in relevant part as follows:

"At any time within the probation period, the probation officer may for cause arrest the probationer whenever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district

Basso was indicted by the grand jury for tax evasion, and on November 22, 1976, he pleaded *nolo contendere* to one count alleging such evasion in 1969. Thereafter, on January 14, 1977, Judge Zampano of the District of Connecticut sentenced Basso to a three-year term, execution of which was suspended, with Basso placed on two years probation and fined $4,000. Basso subsequently paid the fine in full.

Basso was initially assigned to Probation Officer Joseph Gagne, who informed him of the conditions of his probation. Condition 2 required that "You shall associate only with law-abiding persons. . . ." Officer Gagne explained this condition to Basso in detail, advising him that he could not associate with persons who had a criminal record, were engaged in ongoing criminal activity, or were on probation or parole.

On November 28, 1978, Officer Gagne was transferred to another probation district and Officer David Pond took over supervision of Basso's probation. After examining Basso's file Officer Pond spoke to State Trooper Robert Blair, an undercover policeman investigating a so-called "Pizza Village" drug conspiracy, who had written a report on January 30, 1978, describing a meeting attended by Basso and several convicted criminals and alleged members of the Pizza Village conspiracy. Trooper Blair stated that Basso had called

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in which he is found, and in that case he shall be detained pending further proceedings in such district.

"As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

the meeting, which took place at the Pin-Up Restaurant in Bridgeport, Connecticut, to mediate a dispute over certain gambling interests. One week later, Officer Pond met with Basso, and on the following day, December 13, 1978, he petitioned Judge Zampano for a warrant for Basso's arrest for violating probation.

Officer Pond's petition for an arrest warrant, which was made on Probation Form No. 12, stated in pertinent part:

> "Comes now David W. Pond PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Salvador Charles Basso. . . .
>
> "RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:
>
> On October 21, 1977, at the Pin-Up Restaurant/ Lounge, Fairfield Avenue, Bridgeport, Connecticut, probationer Basso is alleged to have met with Ilario 'Lefty' Regina, William Herman Dorman and Arnold Francis Russo, all of whom have criminal records, all in violation of Condition No. 2 of the Conditions of Probation, which states that, 'you shall associate only with law-abiding persons'. . . ."
>
> "PRAYING THAT THE COURT WILL ORDER a Warrant to issue, said Warrant to serve as a temporary mittimus pending arraignment."

Officer Pond supported Form No. 12 with a two-page memorandum prepared by him, which detailed what Trooper Blair had told him and concluded that Basso was "viewed by law enforcement authorities as a well insulated and low key Mafia figure. . . ."

Judge Zampano did not immediately issue the warrant but suggested that Officer Pond speak with Assistant U.S. Attorney James Pickerstein, who was familiar with the Pizza Village investigation. On December 18 Attorney Pickerstein accompanied the probation officers to Judge Zampano's chambers, and spoke in support of the sufficiency of the allegations. Judge Zampano then signed the warrant.

Basso appeared voluntarily before a magistrate in response to the warrant, and was released on his own recognizance. He then filed several motions, including a motion to dimiss the petition for revocation of probation and to quash the arrest warrant for violating probation on the ground that it was unsupported by probable cause. At a February 22, 1979, hearing before Judge Zampano on the motion to dismiss, Judge Zampano referred to the two-page memorandum supporting Officer Pond's application on Form No. 12. Basso's attorney advised that he had no knowledge of the memorandum, which had not been made part of the court file. Judge Zampano had placed the memorandum under seal because it contained confidential information about undercover activity, stating that it could be unsealed by either court order or consent of the Government (the document remained sealed until March 5, 1979, when the Government consented to unseal it). Judge Zampano then transferred the case to Judge Burns in the interest of "the appearance of impartiality," since he had signed the warrant under attack. On November 2, 1979, Judge Burns issued a 41-page Memorandum of Decision quashing the arrest warrant.

Judge Burns found no constitutional infirmity in Probation Condition No. 2's requirement that Basso

"associate only with law-abiding persons." She also stated that "the United States Probation Office, and Officer Pond, did not abuse their discretion or act arbitrarily in prosecuting the charge against Basso, and that there was probable cause to believe Basso had violated Condition No. 2." However, she held that Basso's due process and Fourth Amendment rights had been violated by the warrant for his arrest. In her view the sufficiency of Officer Pond's application must be determined upon his Form No. 12 petition, without regard to the two-page memorandum supporting it, because the contents of the memorandum were not disclosed to the petitioner and were not within the Form No. 12. She also appears to have acted on the ground that the warrant application was insufficiently supported by oath or affirmation. Finally, after observing that "some factual basis for the arrest warrant was necessary for the issuing judge to determine the existence of probable cause,"[2] she held that the petition on Form No. 12 failed to contain the requisite factual basis and quashed the warrant.

The United States appeals from the order quashing the arrest warrant.

DISCUSSION

The procedural stance of this case is somewhat uncertain. Although Basso's motion to quash the arrest

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2 Judge Burns recognized that arrest warrants for violations of probation need not conform exactly to the rigorous standards of probable cause required in criminal arrest warrants, noting that "[t]he strict standards of *Aguilar* [*v. Texas*, 378 U.S. 108 (1964)] and *Spinelli* [*v. United States*, 383 U.S. 410 (1969)], with respect to informants, may be lessened in this circumstance." Memorandum of Decision at 24.

warrant was granted, the district court took no formal action with respect to his motion to dismiss all probation revocation proceedings against him. Absent a dismissal, the Probation Office can issue an order to show cause why Basso's probation should not be revoked, thereby compelling his appearance without use of a warrant; in the alternative it can issue a new warrant for Basso's arrest, supported by a formal oath or affirmation and alleging sufficient facts to establish probable cause under the warrant. Judge Burns acknowledged that sufficient information exists to establish probable cause that Basso violated the conditions of his probation. She quashed the warrant only because she thought the application for it failed to allege those facts properly.

The Government has not pursued these courses,[3] apparently because it believes that the Memorandum of Decision below was intended to dismiss the probation revocation proceedings with prejudice to any further proceedings based on Basso's alleged meeting with non-law-abiding persons at the Pin-Up Restaurant on October 21, 1977. This belief derives from an ex parte inquiry by U.S. Special Attorney Abrams, to which Judge Burns replied that the case was dismissed.

Such a dismissal would clearly be erroneous. "[A]n illegal arrest, without more, ha[s] never been viewed as a bar to subsequent prosecution, nor as a defense."

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3 On January 26, 1979, Officer Pond prepared a second application on Probation Form No. 12, alleging eight additional violations of Condition No. 2. Memorandum of Decision at p. 4 n.1. Judge Zampano has apparently never acted on this form, perhaps because he is awaiting the results of this appeal. The existence of a second petition to revoke probation on the basis of different alleged violations does not foreclose inquiry into the validity of the original proceedings against Basso.

United States v. Crews, ____ U.S. ____, 48 U.S.L.W. 4234, 4327 (March 25, 1980). Accord, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 441 (1886). The Supreme Court in *Crews* was unanimous on this point, see 48 U.S.L.W. at 4328 (Powell, J., concurring); *id.* (White, J., concurring). Though evidence obtained as a direct result of an unlawful arrest is sometimes suppressed, see *Davis v. Mississippi*, 394 U.S. 721 (1969); but cf. *United States v. Frederickson*, 581 F.2d 711, 713, 714 (8th Cir. 1978) (exclusionary rule does not apply in probation revocation proceedings); *United States v. Wiygul*, 578 F.2d 577, 578 (5th Cir. 1978) (same); *United States v. Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975) (same); *United States v. Farmer*, 512 F.2d 160, 162-63 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975) (same); *United States v. Delago*, 377 F. Supp. 708, 712 (S.D.N.Y. 1974) (same), the Government in such cases is required only to purge the taint of illegally obtained evidence from its case, not to drop the case against the alleged wrongdoer. See *Payton v. New York*, 48 U.S.L.W. 4375, 4380 n.34 (April 15, 1980).

Absent prejudice to the arrestee's defense, then, the Government may continue its proceedings against him as if the illegal action had never taken place. In *Gerstein v. Pugh, supra*, for example, the defendant was arrested and jailed pending trial without a finding of probable cause on the basis of a prosecutor's information. While the Supreme Court held that every jailed person has a right to a judicial determination of probable cause either before or shortly after detention, it stressed that "a conviction will not be vacated on the ground that the defendant was detained pending trial

without a determination of probable cause." 420 U.S. at 119. The defendant's proper remedy was to demand the hearing to which he was entitled, not to have the proceedings against him dismissed. Similarly, in *United States v. Companion,* 545 F.2d 308 (2d Cir. 1976), a probationer ordered to remain in Vermont was arrested in Arizona and was held in custody for 87 days without a preliminary hearing to establish probable cause, while being transported from Arizona back to Vermont which took a long period of time because on the way he was detained at various jails. We held there that, although the probationer's due process right to a prompt preliminary hearing "at or reasonably near the place of the alleged . . . violation or arrest . . . to determine whether there [was] probable cause," *Morrissey v. Brewer,* 408 U.S. 471, 485 (1972), had been violated, dismissal of the Government's petition for revocation of probation would be unwarranted, given "the established rule that illegal arrest or detention does not void a subsequent conviction." 545 F.2d at 313.[4]

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[4] Basso argues in his brief that allowing a revocation proceeding to proceed after an unlawful arrest would reduce a probationer's right not to be arrested illegally to "a formality." This argument must fail, for two reasons. First, any significant deprivation of a probationer's liberty must be accompanied by a prompt hearing to insure that probable cause exists to believe that a violation has taken place. Second, as we noted in *United States v. Companion, supra,* 545 F.2d at 313, an unlawfully arrested probationer's "civil remedies against those denying him his right may survive. See *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 . . . (1971)." See also 28 U.S.C. § 2680. We also suggested in *Companion* that "[i]f a probationer's rights are flagrantly abused, or if preliminary hearings are repeatedly denied to probationers as a group, we reserve, of course, the authority, as a matter of our supervisory power, to order release from custody regardless of when the request is made." 545 F.2d at 313. Here Basso was immediately released on his own recognizance, suffering no deprivation of liberty at all. Moreover, he demanded and received a hearing on the issue of probable cause, which the Supreme Court prescribed in *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

(footnote continued on next page)

Unlike the probationer in *Companion,* appellee Basso never spent a moment in jail as a result of the arrest that the district court declared invalid. More important still, his defense has been in no way prejudiced by the existence of the quashed arrest warrant. The Government should remain free to rearrest him for the same violation of the conditions of his probation. The district court's order, insofar as it dismissed the probation revocation proceeding against Basso with prejudice to further proceedings on the same violation, must therefore be reversed.[5]

Turning to the merits of the district court's decision to quash the original warrant for Basso's arrest,[6] we

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The issuance of any arrest warrant here could hardly be characterized as a mere formality. It was issued only after a United States Probation Officer and an Assistant U.S. Attorney furnished detailed facts satisfying a United States district judge that probable cause existed. It would be a gross abuse of discretion to dismiss probation revocation proceedings with prejudice, or to order full release from probation, merely because officials acting in good faith failed to comport with the technical requirements of a valid warrant, when the resulting arrest did not produce any evidence to be used against the probationer and when the probationer could and did protect himself from loss of liberty by obtaining immediate release and a preliminary hearing.

5 Basso's susceptibility to arrest and revocation of probation has not ceased or been mooted because more than two years have passed since he was placed on two years' probation on January 14, 1977. The probation statute, 18 U.S.C. § 3653, explicitly provides, "At any time within the probation period, *or within the maximum probation period permitted by section 3651 of this title [five years],* the court . . . may issue a warrant for [a probationer's] arrest for violation of probation occurring during the probation period." (Emphasis added). See also *Nicholas v. United States,* 527 F.2d 1160 (9th Cir. 1976) (probation revocation may take place more than five years after probation has been imposed if arrest warrant was issued before the five-year period expired).

6 We are not prevented from reaching the merits by the Government's failure to argue that the quashing of the warrant was improper in its original brief. Basso did raise the issue of the

recognize that probation may not be revoked without according the probationer due process. *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); see also *Morrissey v. Brewer, supra* (parolees have due process rights to hearings before their parole is revoked). However, due process in this context does not demand that the probation officer establish a violation of probation in order to obtain an arrest warrant. A showing of reasonably satisfactory proof of cause is sufficient and it may be less than that required for a search warrant, since the arrested probationer has the right to an immediate preliminary hearing after arrest to determine whether probable cause exists to believe that he has violated his probation.[7] The Court in *Gagnon v. Scarpelli, supra,* recognized that less protections were necessary for probationers than for defendants in a criminal trial. See *United States v. Nagelberg,* 413 F.2d 708, 709 (2d Cir. 1968), *cert. denied,* 396 U.S. 1010 (1970); *United States v. Smith,* 571 F.2d 370, 372 (7th Cir. 1978); *United States v. Marron,* 564 F.2d 867, 871 (9th Cir. 1977); *United States v. Manuszak,* 532 F.2d

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propriety of the district court order quashing the warrant in his brief, and the Government, as was its prerogative, responded in its reply brief. The issue has therefore been fully placed before us. See 9 Moore's Federal Practice Par. 228.02[2.-3] (1980).

7 Several jurisdictions have held that a preliminary hearing is not required unless the arrested probationer has been incarcerated. See, e.g., *United States v. Sciuto,* 531 F.2d 842, 846 (7th Cir. 1976); *United States v. Tucker,* 524 F.2d 77, 78 (5th Cir. 1975), *cert. denied,* 424 U.S. 966 (1976); *United States v. Strada,* 503 F.2d 1081, 1084 (8th Cir. 1974). This rule assumes, consistently with much of what the Supreme Court has said, that a probationer receives adequate procedural protection through prompt hearing after confinement. Even if not jailed, probationers are assured swift action in the scheduling of hearings by the mandate of 18 U.S.C. § 3653 that "[a]s speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him."

311, 317 (3d Cir. 1976); *Roberson v. State of Connecticut,* 501 F.2d 305, 308 (2d Cir. 1974).

The revocation of probation, like revocation of parole, "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special . . . restrictions." *Gagnon v. Scarpelli, supra,* 411 U.S. at 781, quoting *Morrissey v. Brewer, supra,* 408 U.S. at 480. We have recognized that the conditional liberty possessed by probationers and parolees carries with it a less than absolute right not to be interfered with by law enforcement officials. In *United States v. Polito,* 583 F.2d 48 (2d Cir. 1978), for example, we stated that a local police officer's detention of a parolee,[8] where a valid warrant had been issued but the relevant federal statute provided that federal officers should execute the warrant, "was not an 'arrest' for Fourth Amendment purposes." 583 F.2d at 56. We further observed that the probable cause necessary to make a warrant valid in parole cases could be established merely by a presentation of "satisfactory evidence" that a person had violated the conditions of his release, a standard looser than that required to satisfy the probable cause requirements for a criminal warrant. 583 F.2d at 52; see 28 C.F.R. § 244(a).[9]

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8 The Supreme Court observed in *Gagnon v. Scarpelli, supra,* 411 U.S. at 782, that it did not perceive "any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation."

9 See *Morrissey v. Brewer, supra,* 408 U.S. at 471 ("We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations"); cf. *United States ex rel. Randazzo v. Follette,* 418 F.2d 1319, 1322 (2d Cir. 1969), *cert. denied,* 402 U.S. 984 (1971) (New York law, under which warrant necessary to arrest parolees for violation of parole is

Although the district court below indicated awareness that the requirements for issuance of a warrant in probation revocation proceedings are somewhat less stringent than those for criminal arrest warrants delineated in *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969), it nevertheless declined to view Officer Pond's warrant petition as adequate. First, in evaluating the sufficiency of the allegations underlying the warrant, it refused to consider the two-page memorandum accompanying the petition on Form No. 12, taking the view that the contents of this memorandum were not part of the warrant application and had not been disclosed to probationer Basso or his counsel. In our view this amounted to undesirably rigid formalism. Judge Zampano had no difficulty recognizing that the memorandum was offered in support of the Form No. 12 application and accordingly evaluated the warrant application in light of it. Moreover, the contents of the memorandum were disclosed to the appellees, albeit at a later time. In any event, non-disclosure of the memorandum's contents before the preliminary hearing did not in any way prejudice Basso or render the warrant invalid. This is not a case where the neutral magistrate was left unapprised of either the identity or the reliability of the confidential source conveying the needed information. See, e.g., *Aguilar v. Texas, supra,* 378 U.S. at 113. So long as Judge Zampano had

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"administrative" and does not depend upon probable cause but upon lesser "reasonable cause," is "sufficient to provide for the lawful arrest of a parolee"); *Alger v. Page Cty. Sheriff's Ofc.*, 408 F. Supp. 978, 979 (W.D. Va. 1976) ("The purpose of the warrant is merely to restore [a parolee] to custody and to advise him of the purpose of his reincarceration").

sufficient information to issue a warrant, Basso did not have to be provided with that information, or given an opportunity to confront his accusers, until hearings on his alleged violation.[10]

Judge Burns' second objection to the warrant application, that it was inadequately supported by oath or affirmation, is somewhat vague, and Basso presses no specific objection to the form of the application. Officer Pond's application was admittedly unsworn, but it clearly contained a representation on his behalf that the facts he was stating were true to the best of his knowledge and belief. Even if the warrant application was faulty in some narrow technical sense (and we are not convinced that it was), this defect should not be sufficient to void the warrant when the facts alleged in the petition and the accompanying memorandum established probable cause, as the district judge conceded, to believe that a violation had taken place,[11]

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10 Trooper Blair's identity might even have been concealed at a preliminary hearing without impropriety. *Morrissey v. Brewer, supra,* 408 U.S. at 487, explicitly stated the reservation that "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross examination."

11 Last year, we held in *United States v. Broward,* 594 F.2d 345 (2d Cir.), *cert. denied,* 442 U.S. 941 (1979), that an arrest made under an invalid warrant was nonetheless valid if the arresting officers had probable cause to believe that a crime had taken place. Under the logic of that case, Basso's warrant could not be quashed once Judge Burns found that his arrest was supported by probable cause, provided the arrest was made in a public place. *United States v. Watson,* 423 U.S. 411 (1976). If it occurred in Basso's home it could be invalidated under the rule of *Payton v. New York,* 48 U.S.L.W. 4375 (April 15, 1980), which held that non-exigent arrests in a person's home could not take place without a valid warrant. The record does not disclose whether Basso was served with the warrant at his home or in a public place, but does indicate that he came to the magistrate's office voluntarily and without police escort. In any

and when the warrant was subject in any case to the somewhat looser requirements accompanying arrest for violation of probation conditions.

Reversed and remanded.

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event, we do not rely on *Broward* in this case, since we think that the warrant application filed by Officer Pond was sufficient to make the warrant for Basso's arrest a valid one.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

As a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York on the twenty-second day of October, One Thousand Nine Hundred and Eighty.

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE WALTER R. MANSFIELD,
HONORABLE WILLIAM H. MULLIGAN,
Circuit Judges.

- x

UNITED STATES OF AMERICA,

Appellant,

-against-

SALVADOR CHARLES BASSO,

Defendant-Appellee.

- x

ORDER AMENDING OPINION

It is hereby ordered that the Court's decision filed September 23, 1980, in the

above case is amended as follows:

Slip Op. page 5769, last line: Change "Reversed and remanded" to "Remanded."

Slip Op. page 5775: Strike the last sentence of the first full paragraph, which reads: "This belief derives from an ex parte inquiry by U.S. Special Attorney Abrams, to which Judge Burns replied that the case was dismissed."

Slip Op. page 5775, beginning of last paragraph: Strike the words "Such a" and substitute "A".

Slip Op page 5778, lines 7-11: Strike the sentence beginning "The district court's order...." and move the footnote number 5 call to the end of the sentence on line 7, the last word of which is "probation."

Slip Op. page 5783, line 4: Change "Reversed and remanded" to "Remanded."

/s/ J. Edward Lumbard, U.S.C.J.
J. Edward Lumbard, U.S.C.J.

/s/ Walter R. Mansfield, U.S.C.J.
Walter R. Mansfield, U.S.C.J.

/s/ William H. Mulligan, U.S.C.J.
William H. Mulligan, U.S.C.J.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES COURTHOUSE

FOLEY SQUARE

NEW YORK 10007

A. DANIEL FUSARO
CLERK

U.S.A. v. Basso	September Term, 1979
Docket No.	Decided September
79-1464	23, 1980

Page 5769, 2d line from bottom of page - delete "Reversed and remanded" and insert "Remanded" in place thereof.

Page 5775, lines 22, 23 and 24 - delete entirely and insert "October 21, 1977." in place thereof.

Page 5775, line 25 - delete "Such a" and insert "A" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hjd

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. B-75-4

SALVADOR CHARLES BASSO :

MEMORANDUM OF DECISION

The federal probationer in this revocation proceeding raises several novel arguments concerning the issuance of an arrest warrant for probation violation under 18 U.S.C. §3653. He also challenges the constitutionality of Probation Condition No. 2, requiring him to "associate only with law-abiding persons," as well as the actions of the United States Probation Office for the District of Connecticut in the handling of his case. The court agrees with probationer Basso that the fourth amendment places certain requirements upon the

issuance of an arrest warrant pursuant to 18 U.S.C. §3653, although such requirements are minimal. The Probation Form No. 12 at issue here, failing to surpass these minimal hurdles, must be quashed. However, the court finds that under the facts of this case, Condition No. 2 is not unconstitutionally vague, tht the United States Probation Office, and Officer Pond, did not abuse their discretion or act arbitrarily in the maintenance of Basso's case, and that there was probable cause to believe Basso has committed an act which would constitute a violation of Condition No. 2.

I. PROCEDURAL HISTORY

The following facts were elicited from testimony and documentary evidence submitted at the March 12, 1979, hearing before this court: On March 26, 1975, probationer Basso was indicted by a federal grand jury in this district for tax evasion for the calendar yers 1968 (Count 1) and 1969 (Count 2). At all times during this prosecution he was represented by Attorney J. Daniel Sagarin, his present attorney. Basso originally pled not guilty; extensive pretrial motions and discovery followed. On November 22, 1976, Basso pled nolo contendere to Count 2. On January 14, 1977, the Honorable Robert C. Zampano, United States District Judge for the District of Connecticut, sentenced probationer Basso to a three-year term, execution of which was suspended, with

two years' probation and a $4,000 fine to be paid within thirty days. Ten days thereafter, Count 1 was dismissed and Basso eventualy paid the fine in full.

Basso was assigned to Joseph H. Gagne, a federal probation officer in Bridgeport, Connecticut, who has eleven years' experience. On the day of sentencing, Basso met with Gagne and signed Probation Form No. 7, entitled "Conditions of Probation." Above Basso's signature are the following sentences, "I have read or had read to me the above conditions of probation. I fully understand them and I will abide by them." Among the seven conditions was Condition No. 2, which reads in full, "You shall associate only with law-abiding persons and maintain reasonable hours." Basso was to report to Gagne on a monthly basis. In July, 1978, Gagne advised Basso that he need

only report to him on a quarterly basis. Thereafter Gagne met with Basso again in November, 1978.

In November, 1978, the federal judges of this district ordered certain personnel changes within the United States Probation Office. In order to fill vacancies created thereby, Gagne was transferred from the Bridgeport office to the New Haven office on November 6, 1978. On November 28, 1978, Basso's file was transferred from Gagne to David W. Pond, a federal probation oficer with four years' experience. Pond met with Basso on December 12, 1978.

The following day, Pond and his supervisor, Tommaso D. Rendino, met with Judge Zampano. The probation officers presented a Probation Form No. 12 and a two-page memorandum prepared by Pond. The probation form provided in pertinent part:

> COMES NOW David W. Pond PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Salvador Charles Basso . . .
>
> RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:
> On October 21, 1977, at the Pin-up Restaurant/Lounge, Fairfield Avenue, Bridgeport, Connecticut, probationer Basso is alleged to have met with Ilario "Lefty" Regina, William Herman Dorman and Arnold Francis Russo, all of whom have criminal records, all in violation of Condition No. 2 of the Conditions of Probation, which states that, "you shall associate only with law-abiding persons" . . .
>
> PRAYING THAT THE COURT WILL ORDER a Warrant to issue, said Warrant to serve as a temporary mittimus pending arraignment.

The two-page memorandum gave greater detail of the alleged meeting of October 21, 1977. Pond's knowledge came from a report, prepared January 30, 1978, by State Trooper Robert N. Blair, who had acted as an undercover agent in what has been termed the "Pizza Village" investi-

gation. This investigation, centering around the Pizza Village Restaurant in Bridgeport, involved narcotics and gambling activity in the greater Bridgeport area. According to Blair, the purpose of the October 21, 1977, meeting, held in a restaurant owned by Basso, was to settle a dispute over certain illegal gambling interests, with Basso acting in the capacity of a mediator. After reciting these facts, Pond made the following observation in his memorandum:

> Reliable sources have advised that Basso controls a major portion of the illegal gambling activity in the Bridgeport area. He is viewed by law enforcement authorities as well insulated and low key Mafia figure, as evidenced by his limited prior record and the nature of his daily activities.

Judge Zampano did not sign the probation form, but rather suggested that the probation officers speak with James Pickerstein, Chief Assistant United

States Attorney, for his legal opinion on the sufficiency of the allegations. The probation officers returned on December 18, 1978, with Attorney Pickerstein, who spoke in support of the form. Judge Zampano signed the warrant on that date. Both the probation form and the two-page memorandum were placed in Basso's file by Judge Zampano's law clerk.[1]

On December 19, 1978, Basso, accompanied by counsel, was presented before Magistrate Arthur H. Latimer, and was released with the agreement of the government. The probationer had appeared voluntarily, reserving the right to assert jurisdictional defects. On January 4, 1979, Attorney Sagarin wrote a letter to Judge Zampano in which he requested the preliminary hearings be conducted by the magistrate, as Judge Zampano had signed the warrant and ultimately would conduct

the final probation revocation hearing. The probationer thereafter filed numerous motions, including a motion for disclosure and production of documents, a motion to dismiss the petition for revocation of probation and to quash the probation violation arrest warrrant for lack of probable cause, and an application for an order directing the probation department to produce certain departmental manuals. On January 17, 1979, Magistrate Latimer sent letters to Attorney Sagarin and to Donald L. Abrams, Special Attorney for the United States Government, stating that an evidentiary hearing addressed to the issue of probable cause would be held on the morning of February 22, 1979. Upon his arrival at this hearing, Attorney Sagarin insisted that the hearing be limited to the motion to dismiss. In light of the confusion, a conference was

scheduled for that afternoon with Judge Zampano.

At 2:30 p.m., February 22, 1979, a conference was held in Judge Zampano's chambers, with Attorney Sagarin, Attorney Abrams, Pond, and Magistrate Latimer in attendance. Judge Zampano suggested that an evidentiary hearing be held on Basso's motion to dismiss. He further stated that due to his congested calendar and in the interest of "the appearance of impartiality," because he had signed the warrant, he would transfer the case to this judge. During the course of the discussion, Judge Zampano made reference to the two-page memorandum prepared by Pond. Attorney Sagarin, describing this memorandum as a "document of which I had no previous knowledge until the moment the Court mentioned it," asked to inspect Pond's report. Pond replied that the

memorandum was a communication for the court's purposes only and was not a part of the official court file. Attorney Abrams, who had not seen the memorandum, analogized it to a pre-sentence investigation, in which the court is "privy to more information than the defense attorney and the prosecutor." Following a brief recess, Judge Zampano placed the memorandum under seal, with the following inscription on the envelope, "This may be unsealed either by order of a court of competent jurisdiction or by written consent of the government."

On March 5, 1979, Attorney Abrams signed a consent to unseal the document, in the presence of this judge. A copy was hand delivered to Attorney Sagarin the following day. An evidentiary hearing was scheduled for March 12, 1979, on this matter.

On the morning of March 12, 1979, Attorney Sagarin stated that, having seen this document, he now requested a preliminary hearing for determination of probable cause as well as on the motion to dismiss. Attorney Abrams voiced objection, at which time a recess was called in which the government attorney could prepare himself for a probable cause hearing. The hearing continued for the remainder of that day on both issues of probable cause and the motion to dismiss, with considerable overlapping with respect to testimony and documentary evidence.

II. THE LEGAL GUIDELINES OF PROBATION REVOCATION

A. INTRODUCTION

The statutory authority governing probation is the Federal Probation Act of 1925, as amended. 18 U.S.C. §3653 provides in pertinent part:

> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title (i.e., five years), the court ... may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed ... by the probation officer or the United States marshall...
>
> As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

The requirements for probation revocation were altered substantially by the United States Supreme Court in the early 1970's. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that the due process clause of the fourteenth amendment requires that two hearings be held

prior to revocation of parole of a state inmate. The Court described the first hearing as follows:

> (D)ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources available.... Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions....

Id. at 485 (citations omitted). This preliminary hearing is to be held before a "neutral and detached" officer. Id. at 486. Sometime thereafter, if the parolee desires, a formal revocation hearing is to be held, for which the parolee would have a wide range of procedural rights, including written notice of the claimed violations, disclosure of evidence against him, opportunity to be heard and

to present witnesses and documentary evidence, right to confront and cross-examine adverse witnesses, a "neutral and detached" tribunal, and a written statement as to reasons for revoking parole. Id. at 487-89.

The next term, the Supreme Court conferred these same due process rights upon suspected violators of probation, in Gagnon v. Scarpelli, 411 U.S. 778 (1973). There the Court concluded:

> (The Warden) does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one. Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing under the conditions specified in Morrissey v. Brewer, supra.

Id. at 782 (footnotes omitted). Thus, the provisions of 18 U.S.C. §3653 must

be read with due regard for the constitutional mandates of the Morrissey and Gagnon opinions.

Although significant liberty interests are involved, the Supreme Court has made clear that a parole or probation revocation proceeding is not part of a criminal prosecution, and thus the "full panoply" of constitutional rights due a criminal defendant does not apply to parolees and probationers. Morrissey v. Brewer, supra. 408 U.S. at 480. For example, the government's burden of proof is not "beyond a reasonable doubt," as in criminal prosecutions; rather, all that is required for revocation of probation is that the court be reasonably satisfied that the probationer has abused the opportunity given him or her to avoid incarceration, by violating local, state, or federal law or by violating one or

more conditions of probation. United States v. Smith, 571 F.2d 370, 372 (7th Cir. 1978); United States v. Marron, 564 F.2d 867, 871 (9th Cir. 1977); United States v. Manuszak, 532 F.2d 311, 317 (3d Cir. 1976); United States v. Francischine, 512 F.2d 82, 829 (5th Cir. 1975); United States v. Nagelberg, 413 F.2d 708, 709 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970). See also Roberson v. State of Connecticut, 501 F.2d 305, 308 (2d Cir. 1974) (same standard applied for state probation revocations). Similarly, indigent probationers do not have a sixth amendment right to counsel at revocation hearings, as the Supreme Court in Gagnon held that appointment of counsel is to be made on a case-by-case basis. 411 U.S. at 783-91. In addition, Fed. R. Evid. 1101(d)(3) specifically provides that the federal rules of evi-

dence are inapplicable in proceedings for "granting or revoking probation." A majority of courts also has rules that the exclusionary rule for suppression of evidence does not apply in probation revocation proceedings. E.g., United States v. Frederickson, 581 F.2d 711, 713-14 (8th Cir. 1978); United States v. Wiygul, 578 F.2d 577, 578 (5th Cir. 1978); United States v. Winsett, 518 F.2d 51, 53-55 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160, 162-63 (6th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Delago, 397 F. Supp. 708, 712 (S.D.N.Y. 1974). Contra, United States v. Workman, 585 F.2d 1205, 1208-11 (4th Cir. 1978). Lastly, a probationer is not entitled to a preliminary hearing unless he or she has been taken into custody and deprived of freedom awaiting the final revocation hearing. United

States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976); United States v. Tucker, 524 F.2d 77, 78 (5th Cir. 1975), cert. denied, 424 U.S. 966 (1976); United States v. Strada, 503 F.2d 1081, 1084 (8th Cir. 1974); United States v. Langford, 369 F. Supp. 1107 (N.D. Ill. 1973).

B. PROBATION REVOCATION ARREST WARRANTS AND THE FOURTH AMENDMENT

Probationer Basso's first argument is that the issuance of an arrest warrant for probation revocation without sufficient basis to determine probable cause is violative of his fourth amendment rights.[2] Probationer correctly observes that Probation Form No. 19, entitled, "Warrant for Arrest of Probationer," instructs the United States Marshall as follows:

> You are hereby commanded to arrest Salvador Charles Basso and bring him forthwith before the United States District Court for the District of Connecticut in the

> city of New Haven to answer to charges that he had violated the conditions of probation imposed by the United States District Court for the District of Connecticut on Jan. 14, 1977.

No case law concerning the application of the fourth amendment to arrest warrants for probationers has been cited by the government or the probationer and the fourt has found none. Therefore, analogies must be drawn from cases involving searches, with or without a warrant, of parolees and probationers. While many circuits agree that probationers and parolees have fourth amendment rights with respect to searches, there is considerable controversy concerning the scope of this constitutional right. The Second Circuit has maintained the "reasonable grounds" test developed in United States ex rel. Santos v. New York State Board of Parole, 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025

(1972). There a New York City detective had "received information which provided him with reasonable grounds to believe that appellant, a parolee, was 'dealing' in stolen goods." 441 F.2d at 1217. When informed of this by the detective, the parolee's parole officer "obtained a parole violation warrant, believing that there was more than reasonable grounds to conclude that Santos had lapsed into criminal activity." Id. The parole officer, accompanied by a detective, subsequently visited the parolee's apartment for purposes of executing the arrest warrant and the parole officer then searched the apartment without a search warrant, finding several items of stolen property. In a new prosecution, Santos unsuccessfully moved to suppress, arguing that his fourth amendment rights were "coextensive with those guaranteed

to ordinary citizens." Id. at 1217-18. The Second Circuit rejected this contention, finding that a parolee's fourth amendment rights were somewhat diminished:

> Without attempting to define precisely the extent of Fourth Amendment protection against searches and seizures which a parolee might have in the abstract, it is indisputable that the Fourth Amendment affords protection only against an unreasonable search. A search which would be unlawful if directed against an ordinary citizen may be proper if conducted against a parolee.

Id. at 1218.

The Ninth Circuit took a somewhat different view in two companion cases, Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), cert. denied, 423 U.S. 897 (1975) and United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975).[3] In Latta, the state parolee had been arrested without a warrant when his parole officer discovered him holding a pipe with mari-

juana. Approximately six hours later, the parole officer conducted a warrantless search of Latta's home, where he discovered a four-and-a-half pound brick of marijuana in Latta's garage. While the plurality opinion held that parolees were entitled to the fourth amendment prohibition against unreasonable searches, this right was somewhat minimal and did not require the obtaining of a search warrant:

> (T)he parolee and his home are subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties.... His decision may be based upon specific facts, though they be less than sufficient to sustain a finding of probable cause.

521 F.2d at 250.

In dicta, not supported by a majority of the court, Id. at 253-54 (concurring opinions), the plurality observed,

> [The officer's decision] may even be based on a "hunch," arising from what he had learned or observed about the behavior and attitude of the parolee. To grant such powers in the parole officer is not, in our view, unreasonable under the Fourth Amendment. The principal protection against abuse of this authority is the "helping" function of the parole officer's job, and the training that he has received to fit for that job. A good parole officer does not regard himself as a policeman.

Id. at 250.

In light of this position, it is not surprising that the court ruled the search there was unreasonable and that a parole officer is not required to obtain a search warrant for an otherwise reasonable search. The court relied upon several Supreme Court cases in which the Court refused to require a warrant in certain types of administrative searches. Id. at 251, citing United States v. Biswell, 406 U.S. 311 (1972) (warrant not required for search under Gun control

Act); Wyman v. James, 400 U.S. 309 (1971) (dicta) (warrant not required for home visit by welfare worker). In dismissing a warrant requirement, the plurality observed:

> We think it indisputable, in view of the nature of parole and of the parole agent's responsibilities as we have analyzed them, that were a warrant required, the showing necessary to obtain it would have to be substantially different from probable cause to avoid frustrating the purposes of parole. A magistrate required to issue a warrant on the basis of the parole officer's "hunch" serves little or no purpose properly related to the parole system. Whether "founded suspicion" in this context could be more demanding than "hunch" is at best uncertain. The judicial energy that review of the affidavits that these almost gossamer standards would require can better be spent determining whether the particular search in question was reasonable. We have no desire to reduce the warrant to a paper tiger. Yet that is what we would do if we were to impose a warrant requirement. Because of the necessarily broad nature of the parole officer's authority, in most cases the magistrate would have to take the parole officer's word for it

> when the parole officer asks for a warrant. This affords no real protection to the parolee; it makes the warrant a mere piece of paper.

521 F.2d at 251-52.

The same analysis was applied in United States v. Consuelo-Gonzalez, supra, to obtain a different result with respect to a federal probationer. The distinguishing factor was that the search in Consuelo-Gonzalez had been conducted by police officers rather than by probation officers. The court made clear that had the searching party been probation officials, the search would have been reasonable. 521 F.2d at 265-66.

A strong dissent was filed by Judge Hufstedler, in which two judges concurred, in the Latta case. The dissent took special exception to the plurality's willingness to rely upon a parole officer's "hunches" and to dismiss the need for a warrant:

A warrant should issue to a parole officer to search his parolee's residence upon the officer's showing that the described home to be searched is the residence of his parolee, in which he lives alone or in the company of persons identified or otherwise described; that the parole officer has reasonable cause to believe that the parolee is violating, or is in imminent danger of violating, one or more specified conditions of his parole; and that he has reasonable cause to believe that evidence of such actual or impending violations will be found in the home to be searched. Evidentiary support for the probable cause showing need not meet the high standards of Aguilar-Spinelli (Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969)), but it could not be based on the officer's hunches unsupported by articulated facts. Rather, the standard should be sufficiently flexible to accomodate the parole officer's supervisory obligations, but not so loose as to offer the parolee and his family no protection from arbitrary intrusions by the parole officer or from searches that are unjustifiably broad. To this end, the officer's showing need not be confined to evidence admissible in a courtroom. It could even include information from others whose reliability had not been tested.

521 F.2d at 1256-57 (footnote omitted) (Hufstedler, J., dissenting).

The dicta in the plurality opinions in Latta and Consuelo-Gonzalez have met with little acceptance in other circuits. For example, within this circuit, Chief Judge Curtin of the Western District of New York questioned the appropriateness of the Ninth Circuit's rulings in United States v. Smith, 396 F. Supp. 1155, 1159 (W.D.N.Y. 1975). Judge Haight of the Southern District of New York, after careful analysis of the plurality and dissenting opinions in Latta and the Second Circuit's prior ruling in Santos, fully endorsed Judge Hufstedler's concept of reasonableness, namely that a parole officer must have reasonable cause to believe that the parolee is violating, or is in imminent danger of violating, one or more specified conditions of his par-

ole, in Diaz v. Ward, 437 F. Supp. 678, 686 (S.D.N.Y. 1977). However, Judge Haight refrained from deciding whether in this context the fourth amendment requires the issuance of a search warrant. Id. at 686 n. 15.[4]

A similar result was reached by the Fourth Circuit, in United States v. Bradley, 571 F.2d 787 (4th Cir. 1978). One condition of Bradley's state parole was that he refrain from possessing any firearm without permission. Bradley's parole officer received a telephone call at approximately 3:00 a.m. from Bradley's landlady that Bradley was in the possession of a loaded firearm. Approximately six hours later, two parole officers conducted a search of the parolee's room, without warrant or consent, where they found a loaded firearm hidden in a suitcase. Bradley's parole was revoked

and he later was convicted for violation of federal firearms laws. Upon appeal of his conviction, Bradley argued that the search by the parole officer was in violation of the fourth amendment. The government relied upon the plurality opinion in Latta that a warrantless search was permissible. The Fourth Circuit rejected this contention, ruling that Judge Hufstedler's "well-reasoned dissent ... represents the preferable approach." Id. at 789. The court rejected the Latta plurality position for two basic reasons. First, it found fault with the plurality's interpretation of the administration search cases, relying instead upon Camara v. Municipal Court, 387 U.S. 523 (1967), in which the Supreme Court ruled that, absent certain narrow exceptions, warrants are necessary for conducting administrative searches.

Second, the Fourth Circuit agreed with Judge Hufstedler's analysis in her dissent, 521 F.2d at 257-58, that abuse of discretion by parole officers is more easily preventable by prior judicial approval than by post hoc judicial review. 571 F.2d at 790. The Bradley court thus concluded:

> We therefore hold that unless an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer.

Id. at 789. Some seven months later, the Bradley holding was applied to federal probationers as well, in United States v. Workman, 585, F.2d 1205 (4th Cir. 1978), where the court was impressed by the absence of statutory approval for warrantless searches, in sharp contract to

18 U.S.C. §3653's authorization of warrantless arrests. Id. at 1208.

This court agrees with the viewpoint expressed in the Diaz, Bradley, and Workman decisions that Judge Hufstedler's dissent in Latta is in closer harmony with the fourth amendment than is the plurality opinion. This is particularly true in light of the Supreme Court's recent decision in Marshall v. Barlow's Inc., 436 U.S. 307 (1978) which held that members of the Department of Labor must obtain a warrant prior to conducting searches of commercial premises for suspected violations of the Occupational Safety and Health Act of 1970.

The more difficult question is the impact of these decisions upon the issue at hand, for Latta, Consuelo-Gonzalez, Diaz, Bradley and Workman all involved a parolee's or probationer's fourth amend-

ment rights concerning searches and seizures whereas the instant case involves a probationer's fourth amendment rights with respect to arrests. The court finds the above opinions analogous to the instant case: if a probationer has certain protectible fourth amendment rights vis-a-vis searches and seizures, albeit these rights are less than those accorded an ordinary citizen, a probationer similarly must have some protectible fourth amendment rights regarding arrests. The court's principal concern is the liberty interest of the probationer, which interest the Supreme Court sought to preserve in Morrisey and Gagnon. In Morrissey the Court found a parolee's liberty "although indeterminate, includes many of the core values of unqualified liberty." 408 U.S. at 482. Refusing to adhere to the right-privilege

distinction, the Court found the liberty interest valuable and within the protection of the Fourteenth Amendment. Obviously, a probationer's "liberty" has been diminished by a conviction and imposition of conditions of probation. However, a probationer's liberty interest does not evaporate totally once he or she is placed on probationer status. As mentioned in Part IIA supra, a probationer is not entitled to a preliminary hearing unless deprived of liberty by subsequent incarceration pending a revocation hearing. Such a hearing can be eliminated for the judge at that point in time knows that the probationer is not confined. However, the same cannot be said when a federal district judge issues an arrest warrant for probation revocation. It is not significant in this case that probationer Basso was released on his own

recognizance at the presentment before Magistrate Latimer on December 19, 1978. The significant factor is that the possibility of confinement existed when Judge Zampano signed the Probation Form No. 12 on December 18. A different result would attach if this district used a summons or an order to show cause to compel a probationer's appearance at a formal or informal meeting at federal court. This distinction was illustrated in United States v. Langford, 369 F. Supp. 1107 (N.D. Ill. 1973), where, upon the request of the Probation Office, the United States Attorney issued an order to show cause why Langford's probation should not be revoked. Here the court held that the probationer was not entitled to a preliminary hearing under Morrissey and Gagnon as he had not been arrested:

> In the case at bar, probationer has not been arrested or incar-

> cerated and he will not be unless and until his probation is revoked. In accordance with the usual practice in this District, no arrest warrant has been issued. Instead the Probation Office has requested the United States Attorney to move for a rule to show cause. The Gagnon requirement of a preliminary hearing is inapplicable, since ordering a probationer to show cause, unlike an arrest, does not deprive him of his liberty. Like process in a civil suit, it merely requires his appearance in court.

Id. at 1108. The import of Langford is that an arrest, which carries a potential deprivation of liberty, requires a judge or magistrate to conduct a preliminary hearing after the arrest has occurred. Such a preliminary hearing is a mechanism to protect a probation'ers liberty interest during the pendency of the revocation proceeding. While its importance is not to be disparaged, the preliminary hearing is a post hoc remedy. This Court believes that some ante hoc protections are necessary as well. Judge Hufstedler's

dissent in Latta and the Bradley opinion both advocate prior judicial consent rather than after-the-fact review. 521 F.2d at 257-58; 571 F.2d at 790. This court strongly agrees that it is far preferable for a judge to be able to abort possible abuse of discretion by a probation officer than to wait in a passive position with only post hoc remedies. Charges of abuse of discretion can have a devastating impact not only upon the individual relationship between a probationer and his officer, but also upon the perception of the effectiveness of an entire department by its present and potential clientele.

In addition, the Supreme Court required that revocation be made by a "neutral and detached" tribunal. Morrissey v. Brewer, supra, 408 U.S. at 489. The impartiality of a district

No. 80-823

In the Supreme Court of the United States

OCTOBER TERM, 1980

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in quashing the warrant for the arrest of petitioner for the violation of his probation.

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JURISDICTION

The judgment of the court of appeals was entered on September 23, 1980. The petition for a writ of certiorari was filed on November 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted on January 14, 1977, in the United States District Court for the District of Connecticut, of tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to a term of three years' imprisonment and fined $4,000. His prison sentence was suspended and he was placed on two years' probation (Pet. App. 3a).

After petitioner was placed on probation, he was supervised by Joseph Gagne, a federal probation officer in Bridgeport, Connecticut (Tr. 50, 147-148). Gagne informed petitioner of the conditions of his probation, including condition No. 2, which required the probationer to associate only with law abiding persons (Tr. 25-26, 154-156). On November 28, 1978, the supervision of petitioner's probation was transferred to probation officer David Pond (Pet. App. 3a; Tr. 18, 50-54). Pond met with petitioner on December 12, 1978 (Tr. 107-119); the next day Pond and his supervisor filed a petition for a warrant to arrest petitioner for violating his probation. The petition was made on a document known as Probation Form No. 12, and was supported by a two-page memorandum (Pet. App. 4a).[1]

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[1]The petition states in pertinent part (*ibid.*):

> "Comes now David W. Pond PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Salvador Charles Basso . . . .
>
> "RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:
>
> On October 21, 1977, at the Pin-Up Restaurant / Lounge, Fairfield Avenue, Bridgeport, Connecticut, probationer Basso is alleged to have met with Ilario 'Lefty' Regina, William Herman Dorman

The warrant issued on December 18, 1978, but it was never executed. Instead, petitioner, accompanied by counsel, appeared the next day before a magistrate and was immediately released on his own recognizance. Thereafter, he filed numerous motions, including a motion to dismiss the petition for revocation of probation and to quash the probation violation arrest warrant for lack of probable cause (Pet. App. 5a).[2]

On March 12, 1979, a hearing was held in the district court on these motions (Pet. App. 22a). Almost eight months later, that court issued a lengthy Memorandum of Decision (Pet. App. 20a-101a), concluding, *inter alia*, that the Form No. 12 application failed to meet the probable cause requirement of the Fourth Amendment in that it failed to contain the requisite factual allegations and was not made under oath (Pet. App. 67a-69a). That court excluded the accompanying memorandum from consideration, because the contents of the memorandum were not disclosed to petitioner and were not "within"

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and Arnold Francis Russo, all of whom have criminal records, all in violation of Condition No. 2 of the Conditions of Probation, which states that, 'you shall associate only with law-abiding persons' . . . ."

"PRAYING THAT THE COURT WILL ORDER a Warrant to issue, said Warrant to serve as a temporary mittimus pending arraignment."

The accompanying memorandum reported that state trooper Robert Blair, acting in an undercover capacity, had attended the meeting called by petitioner in which he mediated a dispute among the other participants concerning the use of pinball machines for illegal gambling (Pet. App. 3a-4a; Tr. 36-45); the memorandum also noted that petitioner was believed by law enforcement authorities to be a "well insulated and low-key Mafia figure" (Pet. App. 4a).

[2]At a conference held on February 22, 1979, petitioner's counsel asked to inspect the two-page memorandum that had accompanied the application for an arrest warrant. Initially this request was denied due to the confidential information in the memorandum concerning undercover activity, but on March 6, 1979, petitioner was given a copy (Pet. App. 5a, 30a).

Form No. 12 (Pet. App. 67a). Based on these conclusions, the court quashed the arrest warrant (Pet. App. 69a). It also found that the probation office and Officer Pond had not abused their discretion or acted arbitrarily in prosecuting the charge against petitioner, and that there was probable cause to believe petitioner had violated a valid condition of his probation (Pet. App. 101a).

The government appealed, and on September 23, 1980, the court of appeals issued a decision remanding the case. In its opinion, the court emphasized first that, even if the arrest warrant were invalid, that would not justify dismissing the probation revocation proceedings against petitioner (Pet. App. 7a-10a).[3] The court then concluded that the arrest warrant application was sufficient, but even if it was faulty "in some narrow technical sense (and we are not convinced that it was), this defect should not be sufficient to void the warrant when the facts alleged in the petition and the accompanying memorandum established probable cause, as the district judge conceded, to believe that a violation had taken place" (Pet. App. 14a).

ARGUMENT

Petitioner contends (Pet. 17-34) that the warrant for his arrest was invalid because it was not issued upon a proper showing of probable cause.[4]

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[3]In its original opinion, the court of appeals stated that the district court had informed the United States Attorney that it had dismissed the case (Pet. App. 7a); the court of appeals accordingly reversed the order "insofar as it dismissed the probation revocation proceeding * * * with prejudice" (Pet. App. 10a). By an October 22, 1981, amendment to the opinion, the court of appeals deleted the reference to the district court's ex parte communication of its intent to the United States Attorney, and the reversal of the putative dismissal (Pet. App. 16a-19a). The amendment did not, however, alter the court's conclusion that any such "dismissal would be clearly erroneous" (Pet. App. 7a).

[4]Petitioner does not contend in this Court that the probation revocation proceeding should be dismissed (Pet. 16). The court of appeals was

This is, however, a purely academic question in the context of this case. Although the arrest warrant issued, petitioner was never taken into custody in reliance on it. Instead, he appeared voluntarily before a magistrate, and was immediately released on his own recognizance (Pet. App. 5a). Thus, the arrest warrant led to no seizure of evidence or deprivation of liberty. As the court of appeals stated (Pet. App. 10a), petitioner "never spent a moment in jail as a result of the arrest [and] * * * his defense has been in no way prejudiced by the existence of the quashed arrest warrant." Moreover, consideration of the case by this Court at this time would further postpone the holding of the probation revocation hearing, which has already been delayed for more than two years despite the requirement of 18 U.S.C. 3653 that the hearing be held "[a]s speedily as possible after arrest." Cf. *Cobbledick* v. *United States*, 309 U.S. 323 (1940).[5]

In any event, the court of appeals correctly concluded that the arrest warrant was valid. The evidence presented to the judge who issued it amply supported his independent determination that there was probable cause to believe that petitioner had violated his probation. The application and memorandum provided specific factual allegations that established the probability that petitioner had associated

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clearly correct in concluding that even if the warrant were invalid, petitioner would not be entitled to that remedy. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 474 (1980).

[5]If petitioner's conduct merits revocation, his probation should be terminated. If not, he should remain at liberty. The decision concerning petitioner's liberty, however, which has not been reached, should be made not on the basis of the validity of the warrant issued at the commencing of the proceedings but on the basis of the evidence presented at the probation revocation hearing.

with persons with criminal records, in violation of the condition of his probation.[6]

Petitioner's reliance (Pet. 22) on *United States* v. *Workman*, 585 F. 2d 1205 (4th Cir. 1978); *United States* v. *Bradley*, 571 F. 2d 787 (4th Cir. 1978); and *United States ex rel. Santos* v. *New York State Board of Parole*, 441 F. 2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972), is misplaced. None of these cases supports petitioner's assertion that the same rigorous standards that must be met for the lawful issuance of ordinary search and arrest warrants are equally applicable to the issuance of warrants to search or arrest parolees and probationers. Quite to the contrary, those decisions acknowledge that a reduced standard of cause applies to the issuance of warrants in the parole and probation setting. Similarly, Judge Hufstedler's dissenting opinion in *Latta* v. *Fitzharris*, 521 F. 2d 246, 257 (9th Cir.), cert. denied, 423 U.S. 897 (1975), upon which petitioner also relies (Pet. 22), recognizes that the probable cause showing in the parole and probation context may include information from informants whose reliability has not been tested.[7]

---

[6]Indeed, the application alone, which precisely stated the place and date of the meeting, gave the names of the other participants, and stated that they all had criminal records (page 1 note 1, *supra*), adequately alleged facts establishing that a condition of probation had been violated. Cf. *United States* v. *Polito*, 583 F. 2d 48, 52 (2d Cir. 1978); 28 C.F.R. 2.44(a).

[7]Here, however, the identity and reliability of the person supplying the information on which the warrant application was based was established by the supporting memorandum. As the court of appeals stated (Pet. App. 13a):

> This is not a case where the neutral magistrate was left unapprised of either the identity or the reliability of the confidential source conveying the needed information. See, *e.g.*, *Aguilar* v. *Texas*, [378 U.S. 108, 113 (1964)].

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

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